

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
Civil Appellate Side

Second Appeal No. 133 of 2006

Smt.Ansuya Vishnu Joshi
and others

..Appellants

vs.

1. Shri Sayyad Iftikar
Hussain and others

..Respondents

Shri D.B.Patil for appellants.
Shri G.S.Hiranandani i/b Shri C.G.Gavnekar for
respondents.

CORAM: S.C.DHARMADHIKARI J.
16th August, 2007

P.C.

1. This is a second appeal at the instance of the heirs of the deceased plaintiff. The suit has been dismissed by the Trial Court and which dismissal has been upheld by the lower Appellate Court. Shri Patil has urged that for no fault of the parties, litigation has come to an end. He submits that deceased plaintiff stepped into the witness box. His examination in chief is recorded at Exh.37. There is no documentary evidence tendered. However, when he was being cross examined on account of his ill health, he could not remain present and that is how the suit has been dismissed. This dismissal was challenged in appeal with a request for remand of the matter on the ground that

grave and serious prejudice is being caused to the plaintiff who would be non suited completely. There is a encroachment on the property and construction thereof is not authorised and legal. In such circumstances, one more opportunity deserves to be granted.

2. The Trial Court as well as lower Appellate Court concurred in observing that it was the plaintiff who stepped into the witness box but for some reason or the other avoided being cross examined. Roznama and record has been perused which demonstrate number of applications for adjournments on one or the other grounds. The suit was amended but even thereafter the deceased plaintiff did not make himself available for cross examination. Ultimately, evidence was closed and the matter was take up for arguments.

3. Once the plea for remand has been considered and rejected by the lower Appellate Court and rejection has been based on cogent and satisfactory reasons, I see no reason for departing from the said conclusion and reasons.

4. The suit was filed in the year 1988. Enough opportunities were given and cross examination was under way from 1990 to 1994. The Trial Court as well as the

lower Appellate Court should not be blamed for not waiting for the deceased plaintiff to be cross examined. Adverse inference drawn against the deceased is justified in the facts of this case. Cross examination has been avoided by the deceased on some ground or the other. There is no justification for non attendance as well. In such circumstances, dismissal of the suit cannot be faulted. This is not a court where the request for remand made under Order 41 Rule 23 before the lower Appellate Court can be considered again. There is no warrant for reappreciating and reappraising the material on which remand was requested. Second appeal is devoid of any merits and is accordingly dismissed.

(S.C.DHARMADHIKARI J.)